

MONEY AND POLITICS

Bruce Ackerman & Ian Ayres, *Voting with Dollars: A New Paradigm for Campaign Finance*. New Haven: Yale University Press, 2002 Pp. x + 304. \$29.95.

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I. INTRODUCTION

Americans appear to hate politics.¹ And is it any wonder? The process of persuading an increasingly smaller fraction of the electorate to vote for a particular candidate has become unpleasant and expensive. The victorious candidates seem to be joyful for themselves and not for the portion of the republic they serve; the major parties seem to take their definition not from an articulated set of principles but from the fact that they oppose the other party. Some say civility in public matters has degenerated so much that the parties snarl at one another like rival street gangs. Nor is this merely a matter of a style confined to the electioneering season. The incivility and carping are now the norm for public discourse in and out of the election campaigns.² Given the dreary and off-putting nature of public deliberation and discourse, no one can be sure what the true basis of any public act is: did the majority party champion some bill because it truly believed it to be in the public interest? Or were they moved to do so by strategic considerations of outflanking the opposition from introducing a more (less) radical measure? Or was the bill a payment by the majority to a significant group of supporters—

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1. E. J. DIONNE, *WHY AMERICANS HATE POLITICS* 9–28 (1991).

2. Nicholas D. Kristof, *The Left Dumbs Down*, N.Y. TIMES, Nov. 5, 2002, at A27. *See generally* STEPHEN L. CARTER, *CIVILITY: MANNERS, MORALS, AND THE ETIQUETTE OF DEMOCRACY* (1999); *DEMOCRATIC CIVILITY: THE HISTORY AND CULTURAL POSSIBILITY OF A MODERN POLITICAL IDEAL* (Robert W. Hefner ed., 1998); Anthony T. Kroman, *Civility*, 26 CUMB. L. REV. 727 (1995–1996); Raymond M. Ripple, *Learning Outside the Fire: The Need for Civility Instruction in Law School*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 359 (2001).

particularly financial supporters—who had helped them gain or retain office?

One could argue that these doubts and puzzles are nothing new. This is politics, pure and simple, as it has always been—a bare-knuckled sport in which the contestants, even the winners, come out bloody and bowed. As Bismarck famously remarked, “No one who loves sausage or legislation should watch either being made.”³ Rather than complain about the dire state of the American republic, perhaps we should be thankful that there are reasonably good and decent people who are willing to participate in running this gantlet. The rest of us can go about our relatively more pleasant vocations and leave the business of politics to the professionals. Indeed, there are some seasoned students of electoral politics who plausibly argue that, if anything, the tone of politics and the quality of our lawmakers are better today than they have ever been.⁴

These thoughts notwithstanding, the issue that has excited the most scrutiny and the widest consensus for change is the relationship between private money and electoral races. The amounts that the major parties spend in an election cycle are staggeringly large.⁵ In the November 2002 elections, the Republicans had a total of \$527.34 million to spend, and the Democrats, \$343.7 million.⁶ The most expensive race in the country was that for the Senate seat in North Carolina vacated by the retirement of Senator Jesse Helms.⁷ The contenders for that seat—Erskine Bowles for the Democrats and Elizabeth Dole for the Republications—spent a total of \$21 million during the campaign.⁸

There are, I think, two central fears of those who are deeply concerned about the amount of money and its sources in politics. First, there is the fear that the campaign contributions are part of a “market for public policy,” in which the contributors are purchasing political favors.⁹

3. See LEWIS D. EIGEN & JONATHAN P. SIEGEL, *THE MACMILLAN DICTIONARY OF POLITICAL QUOTATIONS* 325 (1993).

4. For a novel about U.S. politics of the late-eighteenth and early-nineteenth centuries, see WILLIAM SAFIRE, *SCANDALMONGER* (2000). To the extent that the book gives an accurate portrayal of those times, the personal vilification in politics then was far worse than it is today. See also JOSEPH J. ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION* (2000) (describing the origins of political parties in the 1790s and the declining importance (and rediscovery) of character among the generation of early leaders of the United States).

5. These sums seem staggeringly large to me. However, as we shall see, there is a plausible view that the amount of money spent on electoral campaigns is a trivial fraction of the monies of the government resources at issue. See *infra* notes 224–35 and accompanying text. That view holds that private campaign contributions are the result principally of a desire to consume (participation in the electoral process) and not a desire to invest in access to elected politicians or to influence particular governmental programs.

6. Thomas B. Edsall, *Republicans: Big Cash Edge; Advantage Likely to Grow*, WASH. POST, Nov. 7, 2002, at A27.

7. Nicole M. Christian et al., *The 2002 Election: South, North Carolina*, N.Y. TIMES, Nov. 7, 2002, at B13.

8. *The 2002 Elections; Spending on Some Senate Races: The South*, N.Y. TIMES, Nov. 7, 2002, at B13. Mrs. Dole, the winner, spent \$11.5 million, and Mr. Bowles, \$9.1 million.

9. See generally DANIEL H. LOWENSTEIN & RICHARD L. HASEN, *ELECTION LAW: CASES AND MATERIALS* 705–46 (2d ed. 2001).

A contribution to electoral candidates by the Widget Manufacturers Association of America is made in the hope of getting legislation or regulations that favor the members of the association.¹⁰ Second, and closely related, is the fear that the distribution of wealth and income is such that not everyone can meaningfully participate in this “market.” For instance, the poor and otherwise disadvantaged may not have the resources to contribute to political campaigns in an effort to bid for legislation and regulation favorable to them.

Most proposals for campaign finance reforms—as well as the legislation enacted in this area—have been directed at addressing these two central problems. There have, for example, been attempts to limit the amount of money and other resources that individuals and groups may give to all candidates in federal elections; there have been attempts to inject public funds into electoral campaigns, presumably so as to allow candidates to substitute away from private funds; and there have been attempts to criminalize quid pro quo political contributions and other practices that may foster the exchange of money for government favor.¹¹ Arguably, these attempts at reform have not been successful.

*Voting with Dollars*¹² makes a strong case that the current methods of addressing the adverse social effects of private money in politics are doomed to failure and, consequently, proposes a substantively new method of limiting the social costs of private campaign finance. The authors—Professor Bruce Ackerman¹³ and Professor Ian Ayres¹⁴—are prolific and original scholars whose work puts them in the highest echelon of the legal academy. Previously, they have written independently on these matters,¹⁵ but this is the first time that they have brought their prior proposals together and have sought to meld them into a coherent proposal for reform. What they have to say—both by way of criticism of the current reform measures and by way of alternative reforms—is important and should be extremely influential. This review has two substantive sections. In part II, I shall review the proposals in *Voting with Dollars*. Then in part III, I turn to a brief critique of the proposals.

10. This sort of contribution is referred to as a quid pro quo contribution. The Widget manufacturers may want protection from lower-cost foreign competitors or state legislation mandating purchase of the products of local manufacturing plants (rather than those from plants in other states).

11. See *infra* text accompanying notes 30–57 (discussing some of these reforms); see also Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1702, 1719–23 (1999).

12. BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS* (2002).

13. Sterling Professor of Law and Political Science, Yale University.

14. William K. Townsend Professor of Law, Yale University.

15. Bruce Ackerman, *Crediting the Voters: A New Beginning for Campaign Finance*, AM. PROSPECT, Spring 1993, at 71–80, reprinted in THE AMERICAN PROSPECT: READER IN AMERICAN POLITICS 218 (Walter Dean Burnham ed., 1995); Ian Ayres & Jeremy Bulow, *The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence*, 50 STAN. L. REV. 837 (1998).

II. HOW TO REFORM CAMPAIGN FINANCE

Voting with Dollars contains both a description of and justification for a radical proposal for the reform of our campaign finance laws.¹⁶ Ackerman and Ayres break with a large number—but not all—of previous commentators on the campaign finance system in holding that the problem is not the amount of money being spent on elections.¹⁷ Indeed, they do not believe that the amount of money is per se corrupting, and their proposals will lead to a significant increase in the total amount of money spent on elections for federal offices.¹⁸ They are, rather, worried about the facts that campaign money comes from a small fraction of the American electorate and may well corrupt the processes of democracy by inappropriately influencing legislation, regulation, and other governmental activities.¹⁹ Their solutions to these problems are novel in that they make extensive use of economic analysis in trying to identify the incentives that the various actors in the political system have and in attempting to fashion solutions that better align individual and social goals.²⁰ A central part of this novelty (and a part that distinguishes their proposal from much of what has been proposed or enacted heretofore) is that the authors use command-and-control regulation as a last resort—specifically, as a back-stop measure to fill gaps in their proposal.²¹

The book consists of three sections. In the first section, the authors describe their proposed reforms (“The New Paradigm”).²² In the second section, they address the practical issues that may bedevil their reforms if they were to be implemented (“The Paradigm in Practice”).²³ The third section is a draft statute—the Citizen Sovereignty Act—to implement the reforms.²⁴ The authors say that the draft is largely the work of Danton Berube, “a successful lawyer from Memphis, Tennessee, whose academic ambitions got the better of him, propelling him to the doctoral program in Yale’s political science department.”²⁵ I shall have relatively little to say about the model statute per se, but I shall refer to it from time to time to clarify obscurities in the text. There are also four relatively short

16. See generally ACKERMAN & AYRES, *supra* note 12.

17. See *id.* at 3–9.

18. *Id.* at 4–7.

19. See *id.* at 4–9.

20. See *id.* at 12–110.

21. *Id.* at 111–27.

22. *Id.* at 3–54.

23. *Id.* at 55–178.

24. *Id.* at 179–221.

25. *Id.* at ix. Berube apparently took a seminar with Ackerman, became intrigued with the Ackerman-Ayres proposals, began joining their working lunches on the book, and undertook the drafting of the model statute. The text material runs from pages 3 through 178, and the Model Statute, from 179 through 221.

appendices to explain some technical background concepts²⁶ and to flesh out some details of the proposal.²⁷

Ackerman and Ayres (like everyone else who works in this area, academic or nonacademic) write against the formidable background of *Buckley v. Valeo*, the United States Supreme Court case that has defined, for over a quarter century, what is constitutionally acceptable in the way of campaign finance reform.²⁸ The authors write with a clear view of what that case might allow. It is importantly not a part of their proposed reform to suggest that *Buckley* was wrongly decided or that it will be amended in the near future. They take the pronouncements of *Buckley* and its subsequent elaborations as constitutional constraints with which their proposals must comply.²⁹

A. *The Old Paradigm for Reform*

Ackerman and Ayres begin the case for their proposals by arguing that the proposals of others, which they lump together as constituting the “old paradigm,” have run their course and are unlikely to be of much further utility.³⁰ There are three central proposals championed by the old paradigm: (1) limiting the total amount of campaign spending; (2) substituting public for private expenditures on campaign finance; and (3) insisting on full disclosure of all campaign finance contributions.³¹ But “[c]ommand and control, bureaucratic subsidies, and full information are part of the problem, not part of the solution.”³²

What is wrong with the old paradigm? With respect to the disclosure of the identity of campaign contributors, their belief is that there is no compelling social reason for politicians to know the names of financial contributors.³³ They analogize the issue to that of the secret ballot.³⁴ Until the late nineteenth century, voters in the United States had to cast their ballots in public.³⁵ Obviously, this allowed the easy enforcement of pre-vote deals between voters and candidates. There was, therefore, a vigorous market in the sale and purchase of votes. But with the spread

26. *Id.* app. A at 223–26 (“The Stabilization Algorithm”), app. B at 227–31 (“The Secrecy Algorithm”).

27. *Id.* app. C at 232–40 (“Designing Contribution Limits”), app. D at 241–46 (“Costs of Administration”).

28. *Buckley v. Valeo*, 424 U.S. 1 (1976); *see also* *Brown v. Socialist Workers ‘74 Campaign Comm.* (Ohio), 459 U.S. 87 (1982). The focus of *Voting with Dollars* is not on *Buckley*. The authors do not propose to overturn that decision; rather, they agree with its central tenets and seek, in Chapter 10, to demonstrate that their proposals are within the constraints established in *Buckley*. ACKERMAN & AYRES, *supra* note 12, 140–59; *see also infra* text accompanying notes 109–10.

29. ACKERMAN & AYRES, *supra* note 12, at 138–40.

30. *Id.* at 3–5.

31. *Id.* at 3–4.

32. *Id.* at 4.

33. *Id.* at 5.

34. *Id.* at 5–6.

35. *Id.*

of the Australian (secret) ballot, it became difficult to enforce deals for the sale of votes, and, as a result, that market disappeared.³⁶ Correspondingly, Ackerman and Ayres argue for a “secret donation booth,” in which contributors make donations anonymously.³⁷ The result will be, the authors suggest in analogy to the effect of the secret ballot, the demise of the market in which donors make contributions in exchange for influence with politicians.³⁸

Another shortcoming of the old paradigm is its insistence on limiting the amount of money involved in politics.³⁹ Ackerman and Ayres emphatically distance themselves from the view that the root of the problem with campaign finance is that there is too much money involved. “We reject centralized campaign subsidies in favor of massive democratization through Patriot dollars;⁴⁰ we reject full disclosure of private contributions in favor of the secret donation booth; we reject comprehensive controls on private money in favor of selective restrictions imposed only as a last resort.”⁴¹

Another problem with the old paradigm, according to Ackerman and Ayres, is that it is ultimately unworkable.⁴² They detect a reform-evasion cycle in which restrictions on campaign finance are initially successful but inevitably followed by ever-more ingenious methods of evading the reform, followed by fresh attempts to restrict the latest methods of evasion, followed by new evasions, and so on.⁴³ Professors Samuel Issacharoff and Pamela Karlan and Dean Kathleen Sullivan have separately characterized this pattern as the “hydraulic theory” of campaign finance reform.⁴⁴ According to this theory, campaign money will find a means of avoiding restrictions, much as water, despite efforts to confine it to a particular place, inevitably flows around obstacles to seek its lowest point of repose.⁴⁵ Attempts to restrict channels or amounts of money flowing to political campaigns are, therefore, likely to be frustrated and unsuccessful.

36. *Id.*

37. *Id.* at 6.

38. *Id.* at 6–7.

39. *Id.* at 7–8.

40. A “Patriot dollar” is a voucher provided at government expense to all eligible voters. Citizens can then donate these Patriot dollars to candidates for federal office. *See infra* Part II.B.1.

41. ACKERMAN & AYRES, *supra* note 12, at 9.

42. *Id.* at 45–46.

43. *Id.* Ackerman and Ayres believe that one effect of this frustration is likely to be the increasing criminalization of politics. *Id.* at 46, 52. Under that process each election may be followed by criminal prosecutions—especially of the losers by the political appointees of the winners. They note that this criminalization will create perverse incentives for campaign donations by making it so important to win that both sides will be induced to cheat even more so as to be more certain to win the election and then be able to send the losers to prison. *Id.* at 53.

44. *See* Issacharoff & Karlan, *supra* note 11, at 1705.

45. ACKERMAN & AYRES, *supra* note 12, at 112 (citing Issacharoff & Karlan, *supra* note 11; Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 668–89 (1997)).

Because of these problems with attempts to reform campaign finance under the old paradigm, Ackerman and Ayres believe that they detect a world-weariness among campaign-finance enthusiasts, a resignation that there is not, after all, much that can be done to break the connection between money and politics.⁴⁶ The only course left for reform, these humbled advocates now assert, is full disclosure of all campaign contributions, a tactic that will somehow (the mechanism being somewhat unclear) reduce the ability of campaign donors to inappropriately influence public life.⁴⁷

As an example of the frustration fostered by reform championed under the old paradigm, consider the recent fate of the Bipartisan Campaign Reform Act, known also as the McCain-Feingold Act.⁴⁸ The authors consider that Act to be the high-water mark of the old paradigm's influence on campaign reform but, like all previous efforts, bound to be less than completely successful.⁴⁹ They find two weaknesses in the Act. First, the Act "continues to rely on low contribution limits as the primary way to prevent quid pro quo corruption,"⁵⁰ and backs up this limit with stiffer and more certain criminal punishment, "risk[ing] making too many lobbyists and politicians into criminals. . . . The only thing worse than lax enforcement would be rigorous enforcement."⁵¹

Second, McCain-Feingold inappropriately, Ackerman and Ayres believe, expands the definition of "express advocacy" (and "electioneering communication," as the Act adds) so far as to endanger free speech, prohibits corporations and unions from spending money on this broadened express advocacy, and requires other organizations to make full disclosure of the source of their funds.⁵² They believe that their own reforms do not have these draconian restrictions.⁵³

Developments regarding McCain-Feingold that have occurred after *Voting with Dollars* went to press would seem to bear out Ackerman and Ayres's predictions. Recall that the Act forbids the national political parties from soliciting or spending so-called soft money (issue advocacy funds) after November 5, 2002.⁵⁴ In June 2002, the Federal Election Commission (FEC or Commission) ruled that this and other restrictions

46. *Id.*

47. *Id.* at 5.

48. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-55, 116 Stat. 81 (codified as amended in scattered sections of 2 U.S.C.) The Act was signed into law by President George W. Bush on March 27, 2002.

49. ACKERMAN & AYRES, *supra* note 12, at 8.

50. *Id.* at 54. McCain-Feingold raises the limit that an individual can give to a candidate's campaign in a given election cycle from \$1,000 to \$2,000. *Id.*

51. *Id.*

52. *Id.* McCain-Feingold defines "electioneering communication" as any broadcast communication that (1) "refers to a clearly identified candidate for Federal office" and (2) is made within sixty days of a general election or thirty days of a primary election. *Id.*

53. *Id.*

54. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-55, 116 Stat. 81 (codified as amended in scattered sections of 2 U.S.C.).

of the Act would apply only to actions and activities occurring after the November election.⁵⁵ That seemed to imply that organizations set up prior to election day might not be subject to the Act's sanctions.⁵⁶ In response, the national parties have set up state organizations and other groups to receive donations that the national parties are barred from receiving after November 5, 2002.⁵⁷

B. *The Proposals: The New Paradigm*

There are two central components to the reforms that Ackerman and Ayres refer to as the "new paradigm": Patriot dollars and the secret donation booth.⁵⁸ At first blush, one might have thought that either of these proposals would have been by itself a significant and complete reform. And one might have thought further that these proposals, estimable by themselves, were substitutes; the task facing public policymakers would be to choose between the two. But the authors mean these proposals, originally developed independently, to be complements, not substitutes.⁵⁹ Patriot and the secret donation booth are to be implemented together; either alone would be inadequate.⁶⁰

I. *Patriot Dollars*

The discussion of Patriot dollars begins with an arresting trope: that our capitalist economic system, in which we allow—even encourage—the unequal amassing of income and wealth, works in large part because we cabin off the political sphere, in which—for most purposes—we are

55. Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064 (July 29, 2002) (to be codified at 11 C.F.R. pt. 100).

56. See generally *id.* McCain-Feingold had prohibited any group "established, financed, maintained or controlled" by a national party from raising or spending soft money. 2 U.S.C. § 441i (2002). The FEC ruling seemed to exclude from this language any group "established, financed, maintained, or controlled" by the national parties prior to November 5, 2002. See generally Prohibited and Excessive Contributions: Non-Federal Funds as Soft Money, 67 Fed. Reg. 49,064. In an op-ed piece, Ackerman and Ayres strongly criticize the FEC's ruling on this and other matters: "The Federal Election Commission has embarked on a suicide mission. . . . As it is currently organized, the FEC deserves to die." Bruce Ackerman & Ian Ayres, Editorial, *Campaign Reform's Worst Enemy*, N.Y. TIMES, July 6, 2002, at A27.

In early December 2002, in *McConnell v. Federal Election Commission* (D.D.C. filed Mar. 27, 2002) a special three-judge panel of the District Court for the District of Columbia began to hear arguments about the constitutionality of McCain-Feingold. It is widely believed that whatever the result in the district court, the case will be appealed to the U.S. Supreme Court. See Richard A. Oppel, Jr., & Neil A. Lewis, *Campaign Law Set for Big Test in a Courtroom*, N.Y. TIMES, Dec. 3, 2002, at A1; see also Charles Fried, *A Campaign Law That Curbs More Than Contributions*, N.Y. TIMES, Dec. 30, 2002, at A17 (arguing that section 204 of McCain-Feingold is unconstitutional in restricting nonprofit groups and others from speaking for or against federal candidates within thirty days of a primary or sixty days of a general election).

57. Don Van Natta, Jr. & Richard A. Oppel, Jr., *Parties Set up Groups to Elude Soft Money Ban*, N.Y. TIMES, Nov. 2, 2002, at A1.

58. See ACKERMAN & AYRES, *supra* note 12, at 1, 4–6.

59. See *id.* at 42–43.

60. See *id.* at 43.

moral equals with each person to count for one but only one, regardless of his or her income and wealth.⁶¹ To make politics work as a counterweight to the economic system, the old paradigm recommends campaign finance reform that looks as “unproperty-like as possible.”⁶² So, the old paradigm pushes toward reforms that eliminate the potentially corrupting influence of private money in so far as possible.

The Patriot system takes a different tack.⁶³ Each voter receives fifty Patriot dollars (regardless of her income or wealth in private dollars) for each federal election. Assuming that there are 100 million voters, as there were in the presidential election of 2000, and that each of them would receive fifty Patriot dollars for each federal election, the annual cost of the program would be roughly \$5 billion.⁶⁴ Generally speaking, each voter could assign her Patriot dollars to candidates for federal office in whatever way she chooses.⁶⁵ And, indeed, candidates will compete for citizens’ Patriot dollars, just as they compete for their votes. The FEC—reconfigured for the purpose of the Ackerman-Ayres reforms in ways noted below—would periodically notify candidates of how many Patriot dollars voters had given to them.⁶⁶ The candidates would then be allowed to collect those sums from the U.S. Treasury in real dollars and spend them in whatever legitimate ways they thought would best advance their chances of being elected.⁶⁷ It would be illegal for voters to convert their Patriot dollars into real dollars directly by selling their dollars to another individual or organization.⁶⁸

Are there any foreseeable problems with Patriot? One possibility that the authors raise is that this particular reform may foster fractionated and fractious multiple parties.⁶⁹ This could happen, for example, if voters use their Patriot dollars principally to make donations to candidates who are independent from the two main parties, thereby giving those independent candidacies more funds and more chances of succeeding than has been the case in the past. Ackerman and Ayres’s concern here is unclear. The U.S. has a “first past the post” system under which

61. *Id.* at 13. The authors call this the “circularity problem.” They put it more strongly than I have above: “The insulation of democratic politics from the rule of big money is . . . a necessary condition for the legitimation of big money in the marketplace itself.” *Id.*

62. *Id.*

63. In this Subpart, I shall lay out the rough outlines of Patriot. In Part II.C, I shall deal with the practical details of implementing the system. *See infra* Part II.C.

It is worth mentioning that Professor Richard L. Hasen made a proposal for a voucher system of campaign finance that bears a general family resemblance to Patriot. *See* Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1, 5–7 (1996); *see also* Richard L. Hasen, *Vote Buying*, 88 CAL. L. REV. 1323, 1326 (2000).

64. *See* ACKERMAN & AYRES *supra* note 12, at 14.

65. There are important exceptions to this freedom. *See infra* text accompanying notes 68–72.

66. *See* ACKERMAN & AYRES, *supra* note 12, at 74.

67. *See id.* at 207.

68. *Id.* at 16 (“We are not creating the new currency to enable Americans to spend an extra night at the movies or the ballpark.”).

69. *Id.* at 22.

the plurality winner in a given jurisdiction wins the office at issue.⁷⁰ We do not have proportional representation like that in the parliamentary systems of Europe.⁷¹ Under the “first past the post” system, it seems to me that the worst that can happen under Patriot is that third-party candidates may receive an advantage vis-à-vis their status in the current system. And that is more likely to enrich than to impoverish our public life, a point with which Ackerman and Ayres appear to agree.⁷²

Another possible problem is that “snowball effects” might take hold under Patriot.⁷³ Success at an early stage of the primary election season could attract an influx of Patriot dollars, causing more success at the intermediate stages of the election, causing more Patriot dollars to flow in, and so on.⁷⁴ On reflection, however, Ackerman and Ayres do not think that this effect is really something worth worrying about.⁷⁵ After all, they ask, should it not be the case that early success begets later success?⁷⁶ Moreover, they hope that Patriot will serve as an incentive for the many eligible voters who do not participate in elections to re-engage in public decision making.⁷⁷ If it happens that they do so by supporting independent candidacies and in contributing to snowballs, that is not really such a cost when weighed against the benefit of broader voter engagement in political deliberation.

2. *The Secret Donation Booth*

Ackerman and Ayres, recall, are eager to reform campaign finance but to do so by “marry[ing] the egalitarian ideals of the ballot box and the flexible response of the marketplace.”⁷⁸ Their reform of private donations to candidates is relatively simple and straightforward—donations must be made anonymously.⁷⁹ Note how strongly against the tide this proposal runs. Most critics (writing within the old paradigm) have

70. *Id.*

71. *Id.*

72. *See infra* text accompanying notes 86–88.

73. ACKERMAN & AYRES, *supra* note 12, at 23.

74. *Id.* We have not seen this yet, but the Ackerman-Ayres reform combines the publicly provided Patriot dollars with privately donated dollars. Presumably Ackerman and Ayres rule out the possibility that donations of private and Patriot dollars will move in opposite directions, offsetting snowball effects. But I do not see why they should make that presumption. Even though they here discount the possibility and dire effects of snowball effects in the donation of Patriot dollars, they later discuss, as we shall see, amending their initial proposal to limit the donations of Patriot dollars in particular races, partially to offset snowball effects, and to allow the FEC to adjust the amount of Patriot dollars issued in subsequent election cycles so as to offset the effect of private dollars.

75. *Id.*

76. *Id.* Ackerman and Ayres use John McCain to illustrate this argument: “[U]nder Patriot, for example, John McCain’s early success on the campaign trail would have generated an enormous snowball of Patriot dollars, and rightly so: *shouldn’t* early successes be rewarded by enabling the front-runners to define the terms of the competition while others stand in the shadows?” *Id.*

77. *Id.* at 23–24.

78. *Id.* at 24.

79. *Id.* at 25.

championed, among other things, full disclosure on the theory that “sunlight is the best disinfectant.”⁸⁰ Ackerman and Ayres want to run in exactly the opposite direction, making it illegal for campaign donors to be identified to donees.

It is surely correct that the corrupting effect of campaign donations comes from its quid pro quo aspect—namely, that the donor is assisting the candidate to be elected in exchange for receiving help from the successful candidate in the form of favorable legislation or other governmental influence. The secret donation booth very cleverly breaks this connection by making it difficult or even impossible, as we shall see, for candidates to identify particular contributions with particular donors. The inevitable result, Ackerman and Ayres suggest, is a decline in private dollars being given to candidates, a decline that occurs, importantly, without apparently running afoul of the First Amendment concerns of *Buckley*, a grounding that would occur with reforms that attempted directly to end private dollar contributions and to substitute public funding.⁸¹

Those are the bare bones of the proposal for a secret donation booth. There are a myriad of practical questions of implementation that need to be answered (such as how successfully the proposal can keep the identity of donees from donors). I address these practicalities in part II.C.

3. *The Marriage of the Donation Booth and Patriot*

Why do the authors suggest that the reforms be undertaken together? The simple answer is that the two reforms complement one another. In particular, Patriot picks up where the weaknesses of the secret donation booth set in, and vice versa. While either reform alone would almost certainly be a substantial improvement over the current state of affairs and better than any other reforms that are being considered, they are unquestionably better if implemented together. Patriot and the secret donation booth make a complete and coherent whole.

Recall that Ackerman and Ayres do not believe that money per se is the problem with today’s political culture.⁸² They believe, rather, that the central problem is that currently campaign donations are thought to be—and may in fact be—quid pro quo donations in exchange for secret

80. LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY* 92 (1914). The quote in full is, “Sunlight is the best disinfectant; electric light the best policeman.” *Id.*

81. They report, incidentally, that the introduction of the secret ballot apparently led to a twelve percent decline in voter turnout. See H. GEOFFREY BRENNAN & LOREN LOMASKY, *DEMOCRACY AND DECISION: THE PURE THEORY OF ELECTORAL PREFERENCE* 219–20 (1993) (“Arguably, some of the point went out of voting once voting ceased to involve an open declaration of one’s political convictions.”); Jac C. Heckelman, *The Effect of the Secret Ballot on Voter Turnout Rates*, 82 *PUB. CHOICE* 107, 119 (1995).

82. ACKERMAN & AYRES, *supra* note 12, at 34.

deals.⁸³ “Once the secret donation booth purges the practice of special dealing, its social meaning as an act of citizenship will be further enhanced.”⁸⁴ If so, then the system of Patriot dollars may so engage citizens in the conduct of campaigns that they might feel fifty Patriot dollars is not enough; they may want to contribute more. The secret donation booth will allow them to go beyond the limits of their Patriot dollars and contribute as much as they like, although anonymously.

The option of secret donations not only allows continuing participation in campaigns after Patriot dollars have been exhausted; it also allows correction of early mistakes. Suppose that someone has an early and strong enthusiasm for Candidate Smith and contributes all of her Patriot dollars to that candidate early in the campaign.⁸⁵ But Smith falters and does not survive the primary campaign. If a voter has spent all of her Patriot dollars on Smith’s candidacy, and if only Patriot dollars can be used in campaign finance, her financial involvement in the election is at an end. But if she could contribute her own money through the secret donation booth, she could still participate financially, even though her Patriot dollars are exhausted. Alternatively, the early donor might have learned something about Smith that puts her off so that she regrets her early support. If she can still contribute by means of the secret donation booth, then she can correct the error. Happily, because of the secrecy of the subsequent donations, someone who supplements her Patriot dollars with private dollars can plausibly contend that she is doing so only because she cares deeply for the direction the republic is tending, not for purely self-dealing purposes.

Ackerman and Ayres make three additional arguments in favor of the use of a mixed system: (1) it corrects for the selective attention of voters and the snowball effects that might arise under Patriot; (2) it allows for the surmounting of the “minoritarian difficulty”; and (3) it serves to ameliorate the possible scuttling of Patriot that incumbents might engineer if private donations were illegal.⁸⁶

Consider, first, the possibility that the authors are overly enthusiastic about the ability of Patriot to revive Americans’ interest in political campaigns. What if voters do not use their Patriot dollars but continue to disengage from campaigns? This is especially likely to occur, if at all, in the early stages of campaigns, before the multiple candidates become a few or two. Here the secret donation booth allows private giving during the early stages of campaigns to prop up candidacies.⁸⁷

Relatedly, most voters may pay attention to the candidates of the major parties and ignore the candidacies of minority or fringe parties. If

83. *Id.*

84. *Id.*

85. This is not really feasible, as we shall see. But imagine it for the sake of this example.

86. ACKERMAN & AYRES, *supra* note 12, at 36–39.

87. *Id.* at 36.

voters are unwilling to commit their Patriot dollars to third-party or independent candidates at an early stage of campaigns and intend to wait until the two major parties have selected their candidates, third-party or independent candidacies—from which much enrichment of the civic culture might come—will be starved of funds. But the possibility of the donation of private dollars through the secret donation booth may keep minority parties and candidates in the election.

Can the secret donation booth truly solve this “minoritarian difficulty?” Ackerman and Ayres believe that it can.⁸⁸ The reason is that the secret donation booth tends to screen out self-dealing donations in favor of donations made for reasons of ideological commitment.⁸⁹ If it is the case that donations made for ideological-commitment reasons will be skewed toward the extremes of the political spectrum, then there is reason to believe that the anonymous donations will substitute for the likely dearth of Patriot dollars for minority parties and candidates.⁹⁰

There is one final, powerful argument for a mixed system: if allowed a free hand in reform, incumbents would probably prefer to abolish private funding in favor of Patriot and then starve Patriot.⁹¹ Left to their own devices, incumbents, who, by assumption, seek to perpetuate their time in office and, therefore, to hobble outside challengers, would prefer to outlaw private donations, including those made in a secret donation booth. This would leave their challengers with only Patriot and their own resources to contest the seats held by incumbents. Incumbents could then further tilt the odds in their favor by then systematically underfunding Patriot.⁹²

The authors recognize that there are other possible mixtures of public and private campaign financing beside the one they propose.⁹³ Why among all the alternatives do they favor their particular mixture? The defining characteristics of their mixture are what they call “unconditionality” and “no-subsidy.”⁹⁴ The no-subsidy principle refers to the fact that each voter receives exactly the same amount of Patriot dollars.⁹⁵ There is no progressivity (or regressivity) in the award of those dollars: the unemployed, poor voter receives exactly the same amount as does Bill Gates.⁹⁶ But given the strong tilt toward progressivity in our income tax

88. *Id.* at 33–44.

89. *Id.* at 37.

90. *Id.* I have some reservations about how likely and how large these ideological-commitment donations will be.

91. *Id.* at 39.

92. *Id.* at 39–40.

93. *Id.* at 40.

94. *Id.* at 40–41.

95. *Id.* at 41.

96. *See id.* at 41–42. Presumably, a regressive Patriot program would give a larger number of Patriot dollars to the poor and progressively smaller amounts as the income or wealth of the voter increased, perhaps falling to zero when the voter’s annual income reached \$1 million. *Cf. id.*

code and in our quasi-egalitarian culture, this argument needs some justification.

Ackerman and Ayres argue in favor of a uniform grant of fifty Patriot dollars on the ground that any alternative would excite pernicious jiggering and rejiggering (depending on who is in power) of the subsidization amounts.⁹⁷ Patriot and the secret donation booth are better understood, perhaps, by analogy to the mixed system of Social Security and private pensions. Just as Social Security provides a floor level of retirement income for all, with individuals and employers free to erect retirement income schemes to rise above that floor, so does Patriot provide a uniform floor for every person's participation in campaign finance with the secret donation booth providing the possibility of supplementing that floor.

Another alternative to their mixed system would involve a progressive matching system, under which private donations would be matched in some manner by something like public Patriot dollars.⁹⁸ But a matching system has problems of administrability and is difficult for normal people to comprehend.⁹⁹ In contrast, Patriot and the secret donation booth are relatively easy to administer (subject to complications that I shall discuss shortly) and to understand. Moreover, a matching program would, most likely, be far more expensive than the simple mixed system that they advocate.¹⁰⁰

The unconditionality principle refers to the fact that each registered voter will receive fifty Patriot dollars without having to fulfill any condition.¹⁰¹ This means, one presumes, that the grant is not conditional on such things as the recipient's having voted in the last election, having made a private donation to a candidate,¹⁰² having paid all outstanding parking tickets, and the like. Just as "[t]he right to vote is not something that must be purchased,"¹⁰³ so too the right to receive Patriot dollars is something that every registered voter ought to have without any other condition.¹⁰⁴

97. *Id.* at 41.

98. *Id.* at 42.

99. *Id.*

100. *Id.*

101. *Id.* at 42–43.

102. For example, everyone might receive fifty Patriot dollars and an additional ten Patriots for each fifty dollars of private donation that they made. There are many questions raised by such a system. For the purposes of Ackerman and Ayres's reform, a particular problem would be that of maintaining the secrecy of the private donations from candidates while somehow revealing the amount of the donations to the government administrator of Patriot dollars.

103. ACKERMAN & AYRES, *supra* note 12, at 43.

104. The old justifications for poll taxes were that one ought to help pay for the electoral system directly—the poll tax being seen as a user fee—or that payment of a poll tax was seen as a signal of serious engagement in public affairs. By analogy, in a matching system of private and public campaign funding, one might argue that a prior private donation might be a condition for receiving Patriot dollars on the ground that the private donation signaled serious attention to electoral matters.

C. *Putting the Proposals into Practice and Plugging Gaps*

Most readers of this review will have spent much of their time during the previous subpart raising questions about the reform proposals. Ackerman and Ayres have anticipated many of these questions and have attempted to respond to them. In this subpart, I report their elaborations on the barebones proposals.

1. *A Practicable Patriot*

So far all we have is a very plausible reform scheme. But there are many practical questions of implementation. For example—“Who should get Patriot dollars? How many? Who may compete to get them? Under what terms?”¹⁰⁵

There is a preliminary issue with which the authors must first deal. What should be done about the financing of exploratory campaigns—pre-election, even pre-primary, campaigns in which candidates are seeking to discern whether there is enough interest in their candidacy to warrant going to a full-fledged campaign? Ackerman and Ayres are willing to return to the old paradigm to deal with the terms and conditions for legitimate campaign finance in an exploratory campaign.¹⁰⁶ They argue for per capita limits on donations to exploratory campaigns, for a limit on the total amount that may be contributed by all donors to these exploratory campaigns, and full disclosure of the names and amounts contributed to each exploratory campaign.¹⁰⁷

Using the old paradigm to regulate campaign finance in the exploratory phase of a campaign and the new paradigm during the primary and general elections creates problems of transition. It is true that some candidates will find the attractions of access to both Patriot dollars and the proceeds of the secret donation booth to be tempting and will step over the divide between exploration and explicit candidacy as early as feasible. But others may not. Some candidates may find it in their interests to postpone making a formal declaration of candidacy and thereby falling

105. *Id.* at 66.

106. *Id.* at 58–59.

107. *Id.* at 59–63. Specifically, they insist that for an exploratory campaign for a House seat, that there be at least twenty-five donors, with each donor limited to contributing \$2,000 toward a total cap on exploratory expenditures of \$50,000. *Id.* at 61. For an exploratory campaign for a Senate seat, they seem to suggest (things are not clear in the text but are clearer in the Model Statute) that there be a minimum of fifty donors, with a per capita limit of \$20,000 per donor and a total cap on exploratory expenditures of \$1,000,000. *Id.* at 60–61, 206–07. For an exploratory campaign for the Presidency, there must be at least fifty donors, with a per capita limit of \$20,000, and a total cap of \$1 million. *Id.* at 61. In all cases there must be full disclosure of the names and amounts contributed. *Id.* at 60, 206. Apparently, their reason for requiring a minimum number of donors is to make it harder for wealthy individuals to finance their own campaigns: each candidate must demonstrate by getting other contributors that he or she has the specified minimal number of supporters. *Id.* at 62. Ackerman and Ayres deal with the constitutionality of this scheme in Chapter 10, discussed in Part II.D *infra*. See *infra* Part II.D.

under the limits of Patriot and the secret donation booth and continuing to amass sums under the relatively generous limits regulating the exploratory campaign. Once they declare their candidacy, for example, the donation booth masks the identity of their donors, and they may want to preserve that identity as long as possible. But the authors view these possibilities as remote, arguing that “[b]y eliminating all funding consequences from the formal declaration of candidacy, we avoid evasive behavior that erodes respect for reform measures[; a]t the same time, the relatively small size of the exploratory fund will require serious candidates to shift quickly into the donation booth system.”¹⁰⁸

The first issue in elaborating Patriot is to decide which citizens should receive those dollars and how they are to be distributed. Ackerman and Ayres insist that only registered voters are to receive Patriot dollars.¹⁰⁹ And they receive them either as a special supplement to their credit or Automated Teller Machine (ATM) cards or as a separate card usable at any ATM.¹¹⁰ They are aware that there must be separate activation codes for the Patriot accounts contained on the credit or ATM cards and that free-floating Patriot dollar cards present a special risk for corruption.¹¹¹ But they believe that the same confidentiality and security conditions that currently protect credit card holders could also be used to keep Patriot accounts secure.¹¹² The upshot is that registered voters may assign their Patriot dollars simply by going to any ATM.¹¹³

There are three additional rules for Patriot. First, voters have a “cooling off” period of five days after making a Patriot donation to change their minds.¹¹⁴ Not only does this allow for “sober second thought,” but it also makes it difficult, they believe, for someone bent on

108. ACKERMAN & AYRES, *supra* note 12, at 63–64. In a discussion of the position of wealthy individuals who finance their own exploratory campaigns, the authors express the view that no one wants plutocrats to dominate democratic campaigns; nonetheless, they respect the current Supreme Court’s view that the wealthy are free to spend their own income and wealth, without limit, on exploratory, primary, and general campaigns. *Id.* at 62–63. However, my reading of the Model Statute indicates that although a candidate is exempt from the individual limits on exploratory campaign regulations, she is not exempt from the total cap. *Id.* at 206. If that is a correct reading, then the Model Statute may run afoul of *Buckley*. Ackerman and Ayres do point out that there is a moment of truth for wealthy individuals: at the dividing line between the exploratory phase and formal candidacy, the candidate must choose whether to opt for Patriot-donation booth or rely *only* on her own resources. *Id.* at 64–65.

109. *Id.* at 66–67.

110. The authors note that there are approximately 130 million people registered to vote but 150 million ATM or credit cards. According to the Federal Reserve, slightly more than ninety percent of families in the United States have “some type of transactions account” that is electronically accessible. Recent federal legislation mandates that the states make welfare, food stamps, and other benefits obtainable through electronic cards with a machine-readable strip. *Id.* at 68.

111. *Id.* at 67.

112. *Id.* at 69.

113. *Id.* I would also hope that one could use his or her Patriot dollars online. In that we are or should be moving toward online local, state, and federal voting, we ought also to be moving toward a system of making donations by way of the Internet. Ackerman and Ayres also look forward to widespread Internet use as a means of simplifying many of their proposals. *Id.* at 70.

114. *Id.* at 69.

fraud to organize a black market in Patriot dollars effectively.¹¹⁵ Second, the Patriot donations should be anonymous.¹¹⁶ This also deters fraud in that it will make it difficult for a Patriot-dollar buyer to check to see if the donation has, in fact, been made.¹¹⁷ Third, each Patriot account expires at the end of six years.¹¹⁸ Renewal occurs whenever an account holder votes or uses her card during the six-year period.¹¹⁹

The second practical issue is to specify who may legitimately receive donations of Patriot dollars. There are two legitimate recipients: candidates for federal office and Political Action Committees (PACs), such as those of the National Rifle Association and the Sierra Club.¹²⁰ Recall that an individual's donations of Patriots are to be anonymous so that the PACs would not know who had donated to them, only the amounts.¹²¹ However, there is no requirement of secrecy for the transfer of Patriot dollar amounts from PACs to candidates for federal office.¹²² Indeed, one could argue that it would help public decision making if everyone has some idea—however hazy—of how many and to whom each PAC donated Patriot dollars. Importantly, the PACs must hand over those Patriots to candidates; they may not use these dollars to do independent issue advocacy or to advocate independently for particular candidates (although they may use green-money donations to advocate for issues or independently to advocate for candidates).¹²³

The third issue is to decide on any additional limitations on individual contributions of Patriot dollars. Here there is a bit of a surprise. Rather than to simply allow individuals to do with their fifty Patriot dollars as they would choose to do, there are some significant restrictions. Specifically, the fifty Patriots are to be divided into subaccounts, with ten

115. *Id.* Recall that the Patriot card or account requires a personal identification number (PIN) to activate; that the card may be either a free-standing card or attached to an existing credit or ATM card; and that individual voters cannot legally or directly convert their Patriot dollars into real dollars. Ackerman and Ayres say that if I want to use your Patriot dollars, I will have to accompany you to the ATM and watch you make the donation before handing over twenty dollars. *Id.* They believe that the cooling-off period will make it difficult for the Patriot-buyer to be certain that the seller has not revoked the donation. *Id.* And they correctly believe that most people would be unwilling to turn their credit or ATM cards over to the buyer for the duration of the cooling-off period. *Id.* But if there are free-standing Patriot cards, fraud is far simpler: simply offer a Patriot holder thirty dollars, say, for their card and PIN. I fear that there will be far more of those transaction than the authors believe.

116. *Id.*

117. *Id.* But there are problems here. First, any donor would want to be certain that her donation had been received and not lost in the ether or mistakenly or fraudulently diverted to an unintended candidate. So, even with anonymity, Patriot donors need some means of assurance that their donation reached its intended recipient. Second, anonymity will protect the fraudster who has purchased the free-floating card. Once he has secured the card, there is little opportunity for the authorities to detect when or to whom he has made an illegitimate donation.

118. *Id.*

119. *Id.*

120. *Id.* at 71–75.

121. As we shall see, under the Ackerman and Ayres reforms, PACs can also receive green money donations but only through the secret donation booth. *See infra* Part II.C.2.

122. ACKERMAN & AYERS, *supra* note 12, at 73.

123. *Id.* at 73–75.

Patriots to be allocated to a candidate for a House seat, fifteen Patriots to a candidate for a Senate seat, and twenty-five Patriots for a candidate for the Presidency.¹²⁴ These restrictions take their justification, say the authors, from the separation of powers:

By creating office-specific accounts, our system will require citizens to consider that presidents can't even make Cabinet appointments unless the Senate cooperates, and that lawmaking is a matter for all branches. By making three distinct [P]atriotic decisions, each citizen will be reenacting and reaffirming the fundamental character of the separation of powers in our constitutional system.¹²⁵

But this system of subaccounts presents some formidable administrative problems. First, there is a race for the House in every election cycle, but not so for Senate and president.¹²⁶ There is a race for the presidency in every other federal election cycle and in any particular federal election, only two-thirds of states hold senatorial elections.¹²⁷ If every voter received the same amount of Patriot dollars, regardless of the federal races actually contested in her state, there would be unfair disparities. To see why, suppose that everyone receives fifty Patriot dollars. Voters in states where there is no Senate race could allocate their Patriots between the presidential and House candidates in a way that those who must allocate among president, Senate, and House cannot. One method of dealing with this disparity would be to limit the amount of Patriot dollars depending on the number of federal races that are being held in the state. So, for example, in a nonpresidential year someone in a state in which there is no Senate race might receive only ten Patriots while someone in a state in which there was also a Senate race might receive thirty-five Patriots. But notice that without any further restriction, the person receiving the greater amount could have a greater impact on, say, a House seat than could a person receiving the lesser amount. For instance, the person receiving thirty-five Patriots might put that entire amount on the House race, which is much more impact (by means of this method of public funding) than the average citizen spending only Patriots can have in another state in which there is no Senate race occurring.¹²⁸

The proposed reform can solve these distributional problems by having office-specific accounts and by limiting the amount of money that each registered voter receives in her account depending on the actual

124. *Id.* at 76.

125. *Id.*

126. *Id.*

127. *Id.*

128. And as Ackerman and Ayres point out, in a year in which there is a presidential race, there could be similar disparities. "Suppose, for example, that voters in New York get \$50 in their accounts because all three offices are up, while voters in California only get \$35 because no Senate race is being contested." *Id.* at 76-77. If New Yorkers chose to put the entirety of their Patriot accounts on the presidential race, they would have more clout in that race than would Californians, which would be an "absurd result." *Id.* at 77.

number of elections that are to be contested in her state in a given election cycle.¹²⁹

But there are still more problems. Ackerman and Ayres worry whether one should be allowed to spend one's Patriot dollars on House and Senate races in states other than one's own.¹³⁰ Ultimately they decide that they should, although the case for donations of Patriot dollars to out-of-state Senate races is, they say, weaker than the case for out-of-state House races.¹³¹

Another complication concerns the portion of Patriot dollars earmarked for presidential races.¹³² The twenty-five Patriot dollars that are available only for donation to candidates for the presidency is to be further divided into two subaccounts—one for the primary elections and another for the general election—but only when there is an incumbent running for reelection.¹³³ This is meant to give a leg-up to the “out-party” and to balance a structural advantage that the incumbent has.¹³⁴ I am puzzled as to how these subaccounts accomplish this. One could just as easily argue that allowing the unrestricted allocation of the twenty-five presidential Patriots—for example, the entire amount in a primary campaign—would give a challenger an even bigger chance of defeating an incumbent.

129. *Id.*

130. *Id.*

131. *Id.* at 77–78. I do not find this section of the reform proposal to have been thoroughly thought through. First, I believe that the two cases are donations to out-of-state Senate races and out-of-district House races. I live in east central Illinois but might wish to donate some of my Patriot dollars to a candidate in a congressional district near Chicago. Second, they suggest that a strong reason for allowing the donation of Patriot dollars to out-of-state House races is that some minorities may be districted in such a way as not to have a meaningful chance at electing a sympathetic representative from their own district. Allowing members of these minorities to transfer their Patriot dollars allocated for House candidates to another state will at least allow them to have some effect on national political affairs. But it is not clear whether the authors mean this to be an example of why everyone should be allowed to donate to out-of-state races or the only instance—that is, only for minority members in whose district there is no minority candidate—in which those donations should be allowed. *See id.* at 78. They certainly cannot mean the latter if for no other reason than that it is a restriction that is very, very difficult to operationalize, never mind to justify. The Model Statute seems to suggest that every registered voter can donate to any House race in any state (or district, I think). *Id.* at 210–12. Third, even if they sought to restrict the Patriot donations to in-state candidates in Senate and in-district candidates in House races, their earlier decision to allow Patriot donations to legitimate PACs would, in essence, have allowed out-of-state donations because those PACs could presumably transfer Patriots to any candidate they chose. Fourth, there is a problem—a distributional problem—in that the possibility of out-of-state donations of the fifteen Patriot dollars earmarked for Senate races allows only those with Senate races to have an impact on Senate races in other states. Those who do not have a Senate race and who do not, therefore, have fifteen Patriot dollars in their Senate-race accounts could not have this effect. I cannot think of a principled reason for drawing this distinction.

132. *Id.* at 78–79.

133. *Id.* at 79. Ten Patriots (of the twenty-five allotted for distribution to presidential candidates) are to be assigned to the primary subaccount; fifteen Patriots, to the general election account. It is not clear whether the ten primary Patriots are to be available in the general election if they are not spent during the primary elections. There are no subaccounts for primary and general elections for House and Senate races. Clearly, one is going to need counsel and, possibly, an accountant to make use of one's Patriot dollars.

134. *See id.* at 79.

There is one final bit of fine-tuning for the Patriot reform. Ackerman and Ayres worry about the limited amount of citizen participation in primary elections, and they want to create an incentive for that participation to increase.¹³⁵ So, the FEC will match every donation of Patriots made to candidates in primary elections.¹³⁶ As a result, a ten Patriots donation to a candidate in a House primary election will actually generate twenty Patriots for the candidate.¹³⁷

2. *The Cost of Patriot*

How much will all this cost? In the 2000 general election there were 100 million voters.¹³⁸ Assuming the same number of voters and that each of them receives fifty Patriot dollars in a general election, the approximate cost of Patriot in a presidential election year would be \$5 billion.¹³⁹ In addition, the administrative cost of the system would be about \$300 million per year.¹⁴⁰

How does this figure compare with the totals of public and private campaign finance expenses in the last several elections? In the 2000 general elections, “[c]andidates for federal office received only \$235 million in public funds.”¹⁴¹ Private donors gave \$3 billion to various candidates, PACs, and other organizations in the 2000 federal elections.¹⁴² So, the total public and private cost of campaigns for federal office in the last general election was about \$3.24 billion. The \$5 billion approximated cost of Patriot would, therefore, pump a significantly larger total amount into campaigns.¹⁴³ Ackerman and Ayres note that one predictable effect

135. *See id.* at 79–82.

136. *See id.* at 83.

137. *Id.*

138. *Id.*

139. *See id.* The figure is only approximate for a number of reasons. First, assuming that the U.S. Treasury has to put a green money dollar behind every Patriot dollar that is actually donated to a candidate, the \$5 billion cost figure assumes both that every registered voter who has Patriots spends them and that all candidates who have Patriots spend them. The actual cost could be higher or lower depending on how voters and candidates actually use the dollars. Second, remember that the Ackerman-Ayres proposal calls for matching Patriot donations in the early stages of primaries. Depending on the response of voters to this inducement, the cost of the system could go higher. Third, Patriot’s cost will also vary depending on whether there is a presidential election, rising significantly in those years. Finally, it could be that the number of voters increases significantly in response to the reforms here proposed, so that the total cost of Patriot increases. I have no doubt that Ackerman and Ayres would be thrilled if the cost increased for that reason.

140. *Id.* at 69; *see also id.* app. D, at 241–46.

141. *Id.* at 83 (citing figures of 2000 election), at <http://www.fec.gov> (last visited Apr. 5, 2003).

142. “Under the current system, somewhere between 4 and 12 percent of registered voters contribute something to federal campaigns, but only one-tenth of 1 percent give \$1,000 or more.” *Id.* at 31 (citing *The Big Picture: 1996*, at <http://www.opensecrets.org> (last visited Apr. 5, 2003)).

143. Ackerman and Ayres note that the effect of the secret donation booth, to be considered in more detail in the next Subpart, may be a significant reduction in private giving. The \$3 billion contributed in 2000 might fall to, say, \$1 billion. If so, they say, the total amount available to federal candidates, \$6 billion (made up of \$5 from Patriot and \$1 billion in private donations) will be almost double what was available from all sources in 2000. *Id.* at 84.

of the introduction of Patriot will be that the ratio of public to private campaign funds will be very large, perhaps on the order of five to one.¹⁴⁴

Ackerman and Ayres do not believe that there is too much money in politics but rather that there is too little.¹⁴⁵ Their belief that there is not enough money leads them to make two additional proposals with respect to the amount of money allocated by means of Patriot. First, the FEC (reformed in a manner to be discussed shortly) is to adjust the amount of Patriots flowing to voters so that the total amount spent (through Patriot and the secret donation booth) is at the same level (\$3 billion) as was spent in the 2000 campaign cycle.¹⁴⁶ So, for example, if the total amount spent in, say, the 2004 campaign cycle were to be \$1 billion through Patriot and \$1 billion through the secret donation booth, then the FEC would double the Patriots to be issued to each individual in the 2008 cycle to \$100.¹⁴⁷ If there is a “severe drought” in the amount of money accruing to candidates, the Ackerman-Ayres proposal allows the FEC to make adjustments in public funding during the campaign cycle.¹⁴⁸ Specifically, if the total amount generated to all candidates from all sources is less than fifty percent of that generated in previous campaigns, then the FEC can, on its own motion, allocate additional public funds “to every candidate in all races in proportion to the number of Patriot dollars that he or she has collected,” presumably up to the benchmark level.¹⁴⁹

Second, the FEC will also have discretion to increase the number of Patriots in the next comparable election so that the ratio of public to private (secret donation booth) funds is two to one.¹⁵⁰ The authors refer to this as “swamping control.”¹⁵¹ This is a bit puzzling. If the secret donation booth defeats the idea of quid pro quo campaign donations, why are we so concerned about the ratio of public to private campaign contributions?

144. *Id.*

145. “Contrast the \$3 billion contributed during the 2000 campaign cycle with the \$13 billion spent in 1999 for advertising by the auto industry along, and the \$66 billion spent on broadcast spots by all advertisers during the same year.” *Id.* at 85; *see also* discussion at *infra* notes 224–39 and accompanying text.

146. This adjustment is, I believe (but am not certain), to take into account the matching funds given by the FEC during primary campaigns.

147. ACKERMAN & AYRES, *supra* note 12, at 86. This doubling of Patriot would make the expected value of total contributions in 2008 equal to \$3 billion.

148. *Id.*

149. *Id.* Footnote 64 makes clear that the benchmark is for the nation as a whole, not for individual races. *See id.* at 218–19 (Model Statute, § 27(b) and (c)). That Statute makes it clear, as the text does not, that the FEC can pump in Patriot dollars until the total amount of Patriots plus secret donations equals the total amount achieved at some pre-passage benchmark. So, for example, if there was \$500 million in private secret donations and \$1 billion in Patriots, the FEC may put an addition \$1.5 billion into the Patriot program in the next comparable election so as to achieve the total (private) funding level of \$3 billion in the 2000 campaign cycle (assuming that to be the benchmark).

150. *Id.* at 89.

151. *Id.*

3. *The Details of the Secret Donation Booth*

Well before the ink is dry on the act establishing the secret donation booth, big donors and politicians will be seeking to devise methods to avoid the anonymity principle. Donors want to signal the fact that they have made a contribution and its amount. Candidates want to know this information to know to whom to be grateful and in whose interests to direct their energies if they should be elected.

Ackerman and Ayres have devised methods to protect the secret donation booth against efforts to reveal the identity of private donors to campaigns and the amount of money each has given.¹⁵² Their very clever protections fall into two broad categories. The first is the requirement that all private donations be channeled through a Political Contribution Blind Trust operated by the FEC.¹⁵³ The other is a sophisticated algorithm operated by the Blind Trust for reporting to each candidate the amounts of money donated to the Trust in that candidate's name.¹⁵⁴

The authors see no particular need for secrecy with respect to contributions of \$200 or less.¹⁵⁵ However, for those who give sums of more than that threshold, all of which must be made to the Blind Trust, they will only receive a statement that they have contributed "\$200 or more."¹⁵⁶ These larger contributions may be revoked within a five-day period; so, the Blind Trust impounds every sizable contribution for that period before dispersing it to the intended recipient.¹⁵⁷ The combination of this revocation window and the bland receipt (showing only a donation of "\$200 or more") make it difficult for a donor to give credible evidence to a candidate that he or she has made a sizeable contribution.¹⁵⁸ Further, Ackerman and Ayres outlaw bundling by PACs (whereby those PACs would put together numerous individual contributions and identify the donors to the candidates).¹⁵⁹

Recall that Ackerman and Ayres are not centrally concerned about the total amount of money that flows into campaigns, nor are they par-

152. *See id.* at 95–108.

153. *Id.* at 95–96.

154. *Id.* at 96–108.

155. *See id.* at 96. This raises the possibility of a donor's attempting to reveal her identity to a candidate by making a series of \$200 contributions. This would be a time-consuming method of giving, say, \$50,000 (requiring 250 separate transactions), but it is not inconceivable that some donors will be willing to incur these costs.

156. *Id.* Nonetheless, every donor will want to receive assurance that her donation actually made it to the candidate she intended. The authors hope that some technological fix—such as digital-signature verification or some other method not yet evident to them—will serve to provide assurance to the donor. *See id.* at 99.

157. *Id.* at 101.

158. *See id.* at 101–02. As the authors put it, a donor's assuring a candidate that he is the source of a very large contribution is only "cheap talk." *Id.* at 28.

159. PACs must, like individuals, make their private contributions through the Political Contribution Blind Trust. Those committees are free to advocate on behalf of individual candidates and to urge individuals to make blind donations to candidates, but they cannot serve as intermediaries. *Id.* at 98.

ticularly exercised about the amount of money that a given individual may contribute.¹⁶⁰ Rather, they want the secret donation booth to break the quid pro quo link between campaign donations and subsequent governmental favors.¹⁶¹ However, they do make one arresting suggestion: that those who wish to make a donation of more than \$10,000 must enter a physical donation booth.¹⁶² The donee does not actually need to make the donation or to make it in that amount. They simply want a ritualistic aspect of the donation of large sums of money.¹⁶³

Other important parts of the administration of the secret donation booth include a ten-year ban on employing any big donor (or presumably anyone close to a big donor) and a ten-year moratorium on the FEC's publication of a candidate's contribution list.¹⁶⁴ Antifraternalization regulations also prevent FEC and Blind Trust employees from meeting with candidates, their representatives, or with big donors.¹⁶⁵

One of the most important and intriguing aspects of the administrative details of the secret donation booth is the implementation of a secrecy algorithm.¹⁶⁶ Imagine a situation in which a donor tries to skirt the secrecy provisions of the Ackerman-Ayres reforms by giving a large sum of money and then telling the candidate that he has done so and to be on the lookout for, say, a \$40,000 increment to his campaign coffers in the next several days. By this and other forms of "check bombing," as the authors call it, large donors could continue to make themselves known to candidates.¹⁶⁷ To make this more difficult, if not impossible, the authors have devised a secrecy algorithm.¹⁶⁸ The gist of the algorithm is that it identifies surges in contributions through the Blind Trust to candidates and sequesters those donations and smoothes out their dispersal to the candidate so that the candidate cannot tell from examining the inflows into his own campaign coffers whether the claim of a particular donor to have made a significantly large contribution is true.¹⁶⁹

160. *See generally id.* at 3–11.

161. *See id.* at 93–95.

162. *Id.* at 104.

163. *Id.* I find the suggestion intriguing but puzzling. For starters, I am not certain who is to be impressed by the ritual—the donees or the rest of us? If they mean to get the attention of the donees, then they might consider something more along the lines of a three-day purification ritual prior to making such a sizable gift. If they mean to get the attention of the rest of us, then they might consider televising the entering of the physical donation booth (although this could be administratively unwieldy) or allowing those who do, in fact, make such sizable contributions to wear crimson robes in public from the time of the donation until the time of the election.

164. *Id.* at 99.

165. *Id.* at 100.

166. *Id.* at 104–08.

167. *Id.* at 104–05.

168. *Id.* at 105.

169. *Id.* For a more detailed description, see *id.* app. B, at 227–31. Ackerman and Ayres have also performed Monte Carlo simulations to see if their algorithm works, and it apparently does. *Id.* at 229–31.

Ackerman and Ayres note that the idea of a secret donation booth is not untried.¹⁷⁰ Sixteen states “have already tried to prohibit judicial candidates from learning who donates to their (re)election campaigns.”¹⁷¹ And Korea allows, but does not require, political donors to make their contributions anonymously.¹⁷² Chile has also considered making political donations anonymous, and the British Conservative Party has also discussed the “establishment of an independently administered blind trust—a ‘Political Donations Institute.’”¹⁷³

How easily will big givers be able to get around the restrictions of the secret donation booth? One possibility is that they will stop giving directly to candidates and will instead sponsor infomercials on television and radio, ads in newspapers and magazines and on the Internet, and pamphlets in the hope that regulation of these expenditures will be protected and unregulable under the First Amendment.¹⁷⁴ Ackerman and Ayres seek to limit plutocratic influence by imposing an annual limit of \$100,000 on what donors can give to all candidates for federal office.¹⁷⁵ They also want to limit the amount that a donor can give to a PAC for express advocacy to \$25,000 per year.¹⁷⁶

Ackerman and Ayres believe that these emendations to the bare-bones secret donation booth answer the hydraulic critique of campaign finance reform (which, recall, holds that like water seeking the lowest level, donors will find a means around almost any attempt to regulate their activities in the public interest).¹⁷⁷ They have some respect for this critique, but they also believe that “‘organizationally targeted’ regulations provide a decisive response to the hydraulic critique.”¹⁷⁸ Part of the authors’ optimism against the hydraulic critique is that the simultaneous use of Patriot and the secret donation booth will dilute the need for alternative ways of getting money to candidates.¹⁷⁹ But just in case they are wrong and the amount of private money flowing to candidates increases (and, perhaps, succeeds in identifying itself illegally to those candidates), the authors suggest a fail-safe mechanism: the (revitalized) FEC has the authority to inject offsetting amounts into Patriot so that two-thirds of total campaign funds come from Patriot.¹⁸⁰ So, if private money in whatever form increases, so does public money.¹⁸¹

170. *Id.* at 109.

171. *Id.*

172. *Id.*

173. *Id.* For details, see *id.* at 270–71 nn.31–32.

174. See *id.* at 111–13, 118–20.

175. *Id.* at 113.

176. *Id.* at 117.

177. *Id.* at 118–20.

178. *Id.* at 120.

179. *Id.* at 120–21.

180. *Id.* at 121. This is their stabilization mechanism described earlier. *Id.* at 113–18. Note that this is a different ground for FEC intervention than that described earlier. See *supra* notes 152–53 and accompanying text.

181. *Id.* at 121.

There is some command-and-control regulation that is necessary at the margins to protect the program.¹⁸² For example, it will be necessary to define an “independent organization”—independent, that is, from a candidate’s campaign organization—and to define an organization’s “major purpose” (whether it is, for instance, to advocate for a particular issue or to further the election of a particular candidate).¹⁸³ As in other contexts, Ackerman and Ayres present private organizations with a stark choice: “if they do not want to solicit Patriot dollars, they are free to raise private funds outside the donation booth; but if they wish to organize a [P]atriot PAC to obtain public dollars, then this PAC can obtain private funds only through the donation booth, because it is, by definition, a PAC that falls within *Buckley*’s regulatory rationale.”¹⁸⁴ But if they go the independent route, they must be truly independent.¹⁸⁵

4. *A Reorganized Federal Election Commission*

Ackerman and Ayres believe that the current structure of the FEC is not effective, and so a key part of their reform is a significant restructuring of that oversight body.¹⁸⁶ The current FEC consists of six members with three members nominated from each of the two major parties.¹⁸⁷ The fact that there are explicit political-party nominees and that there are an even number of commissioners does not bode well for public-spirited decision making.¹⁸⁸

The authors suggest that the restructured Commission consist of five members, each of whom is a retired federal judge who has served long enough in that prior capacity to qualify for a full federal pension.¹⁸⁹ The commissioners would be nominated by the president and confirmed by the Senate and would serve for a single nonrenewable term of ten years, presumably staggered so that a new member would join the commission every two years.¹⁹⁰

The staff of the FEC will consist of three managers—one to oversee Patriot, one to operate the secret donation booth, and one to enforce the law.¹⁹¹ The enforcement chief will be the Commission’s general counsel and will have authority that is independent of the U.S. Attorney Gen-

182. *See id.* at 123.

183. *Id.* at 123–25. Ackerman and Ayres solve one possible problem here by “treat[ing] all political parties as their candidates’ alter egos.” *Id.* at 124.

184. *Id.* at 125.

185. *Id.* at 125–26.

186. *Id.* at 130–31.

187. *Id.* at 130.

188. *See id.* It would have made eminent sense to have added a seventh member, perhaps a chair, who was selected by the other six members.

189. *Id.* at 129.

190. *Id.* at 130. Naturally, provisions would have to be made for replacement of commissioners who resign or cannot complete their term.

191. *See id.* at 132.

eral.¹⁹² The new FEC commissioners will appoint these managers.¹⁹³ So as further to enhance the independence of the Commission, its budget will be independent of congressional review.¹⁹⁴

The Commission's enforceable criminal sanctions will be few in that the Patriot program and the secret donation booth will have removed much of the problems that plague the current system.¹⁹⁵ Indeed, the criminal sanctions amount to these: "Don't bribe Patriot holders. Don't accept any cash or checks from anybody—tell them to send it to you via the secret donation booth."¹⁹⁶ The level of sanctions to be imposed for violations are to be modulated so as to achieve the greater goals of the reform; if violations are rare, then monetary fines will suffice, but if they are numerous, recurring, and flagrant, then the general counsel may seek more severe penal sanctions, such as imprisonment.¹⁹⁷

D. *The Constitutionality of the New Paradigm*

I am not learned in constitutional law and cannot meaningfully evaluate Ackerman and Ayres's assessment of whether their reform proposal will pass constitutional muster. I can merely report the thrust of their contentions and leave it to other evaluators to weigh their worth.

Ackerman and Ayres identify three central tenets of *Buckley* and one central mistake.¹⁹⁸ *Buckley* exhibits, they assert, a "preference for subsidies [over ceilings on campaign expenditures], [a] concern with the power of incumbents, and [an] emphasis on the expressive dimension of campaign contributions."¹⁹⁹ The authors do not believe that *Buckley* will be overturned in the near future.²⁰⁰ Therefore, all campaign finance reform proposals, including theirs, must seek to stay within its central tenets. But they are not making this argument solely because of *realpolitik*. Rather, they find much to admire in the decision's central tenets.²⁰¹ The central mistake of the opinion, they find, is its blindness to the distorting

192. *Id.* at 133.

193. *Id.* at 132.

194. *Id.* at 135.

195. *Id.* at 137.

196. *Id.*

197. *Id.* at 138.

198. *See id.* at 158–59.

199. *Id.* at 159.

200. *Id.* at 140–41.

201. The authors consider whether *Buckley* was rightly decided and conclude that, with the exception of the central mistake that I shall mention shortly, the Court essentially got the constitutional issue correct. *Id.* at 156–59. They also make much of the fact that those who follow the "old paradigm" of campaign finance reform despise *Buckley*, particularly the opinion's contention that money spent on political advocacy is speech and is, therefore, entitled to the protections of the First Amendment. *Id.* at 158–59.

effect of the existing distribution of wealth and income on campaign financial contributions²⁰² and, so, on our nation's political life.²⁰³

Ackerman and Ayres hold that their reforms skirt the constitutional restrictions articulated by the Court in *Buckley*.²⁰⁴ For example, with respect to Patriot they believe that while *Buckley* is skeptical about campaign expenditure restrictions, it smiles favorably on public subsidization of campaigns.²⁰⁵ Because Patriot is a scheme for extensive public subsidization, mediated, as we have seen, through individual choices, it ought to fall within the Court's constraints.²⁰⁶ The Court has also upheld the same sort of waiver requirement for the acceptance of public funds (under which one must give up access to private funds if one opts to accept public funds) that Patriot incorporates.²⁰⁷ Patriot, of course, goes a bit further than existing law in that it allows access to public funds in exchange for an additional waiver (not to use one's own personal funds).²⁰⁸ Ackerman and Ayres recognize that this particular waiver may trigger close Court scrutiny.²⁰⁹ They are, however, optimistic about the constitutionality of the waiver in the event a constitutional challenge is mounted because their attempt to limit private self-funding is not a blanket proscription but rather a scheme for putting a candidate to a choice between using private (individual) funds exclusively and using the combined Patriot-secret donation booth scheme, and because they believe that the large size of Patriot will induce even the very wealthy to forego relying solely on their own funds.²¹⁰

According to Ackerman and Ayres, another central tenet of *Buckley* and subsequent opinions is that the Court seems to be willing to tolerate restrictions on campaign finance that appear to be closely directed at reducing the risk of corruption.²¹¹ But the tests for toleration of those restrictions are the usual balancing tests that look for compelling public interests and the least-restrictive means of achieving the compelling interests at the heart of the legislation.²¹²

Ackerman and Ayres believe that their reforms avoid being stopped on either balancing test or least-restrictive means grounds.²¹³ They do not, for instance, interfere with a donor's freedom of speech, although in a sly sort of manner: a donor is free to say anything he or she likes about

202. "This is, at any rate, our diagnosis of *Buckley*'s central mistake." *Id.* at 158. *Buckley* allows virtually unlimited contributions by individuals, so long as each contribution is made in a discrete \$1,000 packet. *Id.* at 157.

203. See *infra* notes 216–22 and accompanying text.

204. ACKERMAN & AYRES, *supra* note 12, at 156–57.

205. *Id.* at 158.

206. *Id.*

207. *Id.*

208. *Id.*

209. See *id.* at 142–43.

210. *Id.* at 142–47.

211. *Id.* at 147 n.16, 154.

212. *Id.* at 150, 154.

213. *Id.* at 150–51.

the size of his or her donation through the secret donation booth, leaving aside the issue of whether that speech is to be believed.²¹⁴ As to the freedom to associate, that, too, they believe is left relatively untouched by their reforms.²¹⁵

III. A CRITIQUE

I am an enthusiastic admirer of each of these authors' previous scholarship and am just as taken with the originality, thoughtfulness, and thoroughness of their approach to campaign finance reform in this book. Nonetheless, there are some questions that I have about Patriot and the secret donation booth.

Let me first praise the authors for clearly addressing what are, without any cavil, the two central problems facing our method of electing public officials and for proposing campaign finance reforms that, I believe, are the most innovative and potentially effective of which I am aware. To be clear, the two central problems facing our current system are the ill effects, potential and actual, on our public life of the maldistribution of income and wealth and the possibility that a donation, in money or in kind, to an election candidate is part of an exchange in which the goal is to affect specific legislation, regulation, or other governmental action.

In what follows in this part, I want first to explore these two points by citing some literature that was probably not available to Ackerman and Ayres while they were writing *Voting with Dollars*. I shall then turn to some general criticisms of their proposals.

A. *The Effect of the Distribution of Income and Wealth on Public Life*

To say that the wealthy exert a disproportionate impact (with respect to their numbers) on public life is to state the obvious. As a result, I do not want to belabor this point. I would note, however, that there is, in the professional economics literature, new and important scholarship that argues that a more equitable and equal distribution of resources makes for a better and more efficient society.²¹⁶ For example, Professors Edward L. Glaeser and Andrei Shleifer of Harvard and Professor Jose Scheinkman of the University of Chicago argue that "inequality is detrimental to the security of property rights, and therefore to growth, because it enables the rich to subvert the political, regulatory, and legal in-

214. *Id.* at 147–50.

215. *Id.* at 150–54.

216. This same point is made in a nontechnical manner in KEVIN PHILLIPS, WEALTH AND DEMOCRACY (2002) and Paul Krugman, *For Richer*, N.Y. TIMES, Oct. 20, 2002, G6 (Magazine), at 62.

stitutions of society for their own benefit.”²¹⁷ They consider two examples in light of their theory: the American Gilded Age from 1865 to 1900²¹⁸ and the transition economies of Eastern Europe today.²¹⁹ The authors say that the U.S. dealt with the corrupting effect of concentrated income and wealth in the late-nineteenth century by means of the institutional reforms of the Progressive Era—the income tax and extension of the franchise.²²⁰ The transition economies are producing significant concentrations of income and wealth, but their experience with skewed resource distribution is so new that it is not clear how they will respond—that is, whether the wealthy will grab control of the political, regulatory, and legal institutions and operate them disproportionately for their own enrichment or whether the society will somehow constrain the ability of the very wealthy to have a disproportionate social impact.²²¹ Glaeser, Scheinkman, and Shleifer say that, generally speaking, favor institutional reform rather than redistribution as a method of dealing with increasing inequality.²²²

B. *Quid Pro Quo or Consumption Activity?*

The secret donation booth seeks to break the exchange relationship between campaign finance and subsequent political favor. It seems so obvious that this connection exists that almost nowhere in the literature on campaign finance does anyone justify that assumption. But recent literature in the economics of campaign finance suggests that donors may be making contributions not as an investment in receiving particular governmental favors, but rather as a consumption activity.²²³

In a recent paper, Professors Stephen Ansolabehere, John de Figueiredo, and James M. Snyder, Jr., all of the Massachusetts Institute of

217. Edward L. Glaeser, Jose Scheinkman & Andrei Shleifer, *The Injustice of Inequality*, 2 Harvard Inst. of Econ. Research, Discussion Paper No. 167 (2002), at <http://post.econmics.harvard.edu/hier/2002papers/2002list.html> (last visited Apr. 5, 2003).

218. *Id.* at 21–24.

219. *Id.* at 24–27.

220. *Id.* at 23.

221. *Id.* at 27.

222. *Id.* at 28–29. See generally ACKERMAN & AYRES, *supra* note 12, at 8–9; PHILIPPE AGHION & JEFFREY WILLIAMSON, *GROWTH, INEQUALITY, AND GLOBALIZATION* (1998); GENE M. GROSSMAN & ELHANAN HELPMAN, *SPECIAL INTEREST POLITICS* (2001); Alberto Alesina & Dani Rodrik, *Distributive Politics and Economic Growth*, 109 Q.J. ECON. 465 (1999); Torsten Persson & Guido Tabellini, *Is Inequality Harmful for Growth?*, 84 AM. ECON. REV. 600 (1994); Raghuram G. Rajan & Luigi Zingales, *The Tyranny of Inequality: An Inquiry into the Adverse Consequences of Power Struggles*, 76 J. PUB. ECON. 521 (2000).

223. The economic literature on education used to posit an analogous difference between investment and consumption motives. One might argue that people incur the direct costs of educating themselves and the indirect opportunity costs of forgoing gainful employment as an investment in the acquisition of human capital. Once that capital has been formed, it can generate an income stream much as does any other form of capital. Alternatively, one might argue that people pay for education because they enjoy the acquisition of knowledge—a consumption activity. The consensus view is that there are mixed motives: education is simultaneously an investment in human capital formation and inherently enjoyable to the student.

Technology, argue that the total amount of private money given to electoral candidates is surprisingly small relative to the value of governmental programs.²²⁴ The authors note that “[c]andidates, parties, and organizations raised and spent \$3 billion in the 2000 national elections” but that the value of total federal governmental spending in that year was \$2 trillion and “consumption and gross investment of the federal government [in that year] was \$590 billion.”²²⁵ The amount given to various candidates was, therefore, roughly 0.15 percent of the value of governmental programs at stake.²²⁶

That percentage is startlingly low. A plausible economic theory regarding donations to federal election campaigns is that elections are, in essence, a bidding contest for political favor and that, therefore, the various interest groups must increase the amount given to candidates so that, if successful, they will reap rewards in the form of governmental favor that more than justify their donations. So, if \$2 trillion in annual federal programs is at stake, then one might expect the annual campaign contributions to be relatively close to that amount. But clearly they are not: they are significantly less than one percent of that amount.²²⁷

Ansolabehere, de Figueirido, and Snyder argue further that if donors make campaign contributions on a quid pro quo basis, there ought to be evidence of this with regard to identifiable, discrete industries and governmental programs.²²⁸ For instance, then, defense contractors ought to contribute significant sums of money to federal campaigns to curry favor for government defense contracts. But that is apparently not the case: “All defense firms and individuals associated with those firms gave approximately \$10.6 million to candidates and parties in 1998 and \$13.2 million in 2000. The U.S. government spent approximately \$134 billion on defense procurement contracts in fiscal year 2000.”²²⁹ They find similarly scanty contributions from the agriculture and energy industries.²³⁰ “Crop producers and processors contributed \$3.3 million to candidates and parties in 2000,” even though the value of all crop loans and price supports in that year was \$22.1 billion.²³¹ “Dairy producers, who since

224. Stephen Ansolabehere, John M. de Figueirido & James M. Snyder, Jr., *Why Is There So Little Money in U.S. Politics?* 17 J. ECON. PERSP. 150 (2003) [hereinafter Ansolabehere et al.]. The authors acknowledge that Gordon Tullock first asked, thirty years ago, why there was so little money in U.S. politics, “[c]onsidering the value of public policies at stake and the reputed influence of campaign contributors in policy making.” *Id.* at 110.

225. *Id.*

226. *See id.*

227. One reason why the amount contributed might be significantly less is that, in order to win this “arms race” for governmental favor, the winning side needs only to bid an amount that is greater than what the other side is willing to bid. So, if the other side is relatively impoverished, the winner does not have to spend all that it might be capable of spending but only more than its poorer rivals spend.

228. Ansolabehere et al., *supra* note 224, at 1.

229. *Id.* at 2.

230. *Id.*

231. *Id.*

1996 have had to have subsidies renewed annually, gave \$1.3 million in 2000 and received price supports worth almost \$1 billion in the 2002 Farm Bill.”²³² And in the energy industries, oil and gas producers contributed \$33.6 million in 2000, even though the Department of Energy put an annual value of federal subsidies to the energy industries at \$1.7 billion in 1999.²³³

The most likely explanation for these meager contributions, the authors suggest, is that individuals and groups make political contributions because they enjoy doing so; they get consumption value from participating in the electoral process.²³⁴ “By far the single strongest predictor of contributing is income. The people who give to politics are also disproportionately likely to participate in other ways, including attending meetings, writing letters, talking to others, and voting.”²³⁵

These are, indeed, intriguing arguments. If the authors are correct, then the argument in favor of some, but not all, of the Ackerman and Ayres reforms is weakened. Their strongest justification for the secret donation booth is the widespread belief that donors are buying governmental favors for their contributions and that this inappropriately and unfairly biases governmental policy toward the interests of the donors.²³⁶ But if donors are simply deriving consumption utility from “participating” in public life in the same manner in which, say, they derive utility from making donations to the Chicago Lyric Opera, then there is a very different ground—if any—for regulating this consumption activity than the justification given by the old paradigm or by the fear of quid pro quo influence on governmental actions. Regulation of this consumption activity looks to have more in common with antidrinking, antidrug, and antitobacco crusades than one might have previously thought to be the case.

Of course, these criticisms of reform assume that Ansolabehere, de Figueirdo, and Snyder are correct. If they are not, if, for example, there is a significant investment component to campaign contributions (so that there are mixed consumption and investment motives in campaign contributions, much as I argued there are mixed motives in educational expenditures), then the argument in favor of the secret donation booth survives. If pushed to stake a position on the basis of the evidence at hand, I think that I would come down on the side of those who fear the quid pro quo aspect of campaign finance. I would, therefore, be in favor of the secret donation booth. Nonetheless, I am brought up short by Ansolabe-

232. *Id.*

233. *Id.*

234. *Id.* at 4.

235. *Id.* The authors later suggest that the “question is not why do corporations, unions, and interest groups give so little, but why do they give at all?” *Id.* at 21. And they offer some alternatives to their consumption hypothesis—for example, that these groups “give a little to get a little” or that “money buys access, rather than policy directly.” *Id.*

236. ACKERMAN & AYRES, *supra* note 12, at 6.

here, de Figueirido, and Snyder. They present a plausible and arresting alternative to the most common view of why donors make contributions to political campaigns.²³⁷

C. General Problems with Patriot and the Secret Donation Booth

In the course of describing Ackerman and Ayres's proposed reforms, I have already made some minor criticisms. Here I want to direct my fire at what I believe are three larger questions and problems.

First, Ackerman and Ayres's reforms will inject a significantly larger amount of money into federal campaigns. What will these additional campaign finances monies be used for? In what is for me the only unsatisfying portion of the book, the authors answer this question by speculating about what might have happened in the Republican primaries in 2000 under their reform scheme. They offer what strikes me as a contrived scenario under which George W. Bush would not have won the Republican nomination.²³⁸ But let me not dwell on that example. I wish the authors had addressed a far different question: what kinds of campaigns will we have under their reform proposals? What, in short, will Patriot and the secret donation booth do to the tenor of our electoral life? Because I do not believe that Ackerman and Ayres adequately addressed this issue, let me try my hand at it.

One possible course of affairs resulting from the large influx of funds under Patriot and the secret donation booth is that we simply have more of the mind-numbing nonsense that currently passes for campaigning. If, for example, candidates use Patriot funds to air more and worse television, radio, and Internet commercials, then I am not sure that the voters are going to be very happy with the result. They might well ask why their Patriot money should be used for an increased number of grating attack ads. What then will we have gained?

I suspect that Ackerman and Ayres would hope for and expect different kinds of campaigns under their reforms. Their argument might be as follows. The secret donation booth removes the incentive for candidates to slaver after the funds of special interests and individuals in an exchange for favorable governmental treatment. It also removes the incentive for donors to try to gain access to decision makers and to influence policymaking through campaign contributions. Those who donate through the secret donation booth will presumably do so solely because they like the policies and judgment of a particular candidate. Additionally, I think that Ackerman and Ayres have said that Patriot gives a voice to those who would otherwise not have resources, other than their vote,

237. I also hasten to add that even if Ansolabehere, de Figueirido, and Snyder are entirely correct, there is still a strong argument for a Patriot-dollar brand of finance reform on the ground that there is still a maldistribution of income and wealth.

238. ACKERMAN & AYRES, *supra* note 12, at 170.

by means of which to express their views on which candidates they favor.²³⁹

The crucial question is how candidates will shape their campaigns in response to these altered incentives. Ackerman and Ayres do not explicitly say so, but I am certain that their hope is that the response will be in favor of a more meaningful style of campaigning. And they may be right. No one should expect Pericles in the Golden Age of Athens, but the rhetoric of public debate and the tone of public civility may rise. One might hope that, for instance, campaign debates become as high-minded and informative as that which took place between Senator Joseph Lieberman and now Vice-President Richard Cheney during the 2000 presidential election. The reason that matters may improve to the Lieberman-Cheney debate standard under the Ackerman-Ayres proposal is that, removed from the need to pander to potential campaign donors, candidates might speak more openly about their core values and about where there are genuine differences of principle, and where mere differences of implementation with their opponents; they may more honestly reveal the general policies they would pursue without the electorate's having to figure out if they were speaking in code about the particular campaign contributors whose trouser pockets they intend to line once in office.

But these hopes for reform in the tone of politics may be overly optimistic. It may be that the only response to the infusion of more money and the changed incentives is more dull and insidious television, radio, and Internet ads; more pictures of the candidate and her family and friends; more hour-long infomercials; more ghost-written campaign biographies; more attack ads on the opposition; and some new, distasteful methods of campaigning that have been heretofore unaffordable. I have no way of knowing which result (a higher tone of electoral civility or more tedium and mud) might follow from the implementation of the Ackerman and Ayres reforms. But I suspect that this point will be an extremely important one among the electorate in weighing whether to follow Ackerman and Ayres.

There is one probable positive effect of the Ackerman and Ayres proposals that I do not think that they recognize but that might be the most significant result for public life: we may get a broader and more attractive range of candidates for public office. One hears frequently that the most off-putting aspect of public life today is the need to raise money for campaigns—a task that is apparently so repellent that it drives very capable people from public life and, no doubt, discourages many able people from getting involved. Under Patriot and the secret donation booth, candidates are relieved of the most unsavory aspects of raising money, and, as a result, we may find that many new, fresh, talented, and

239. *Id.* at 9.

eager people present themselves as candidates for public office. That would be a considerable plus.

Second, I am very highly skeptical that Congress will pass anything as ambitious as the Ackerman-Ayres proposal. There are several components to my skepticism. The first is that Congress tends to reform by taking a series of small steps, not by making a leap. The Bipartisan Campaign Reform (McCain-Feingold) Act was a relatively modest movement along the path of reform and was (and is) hotly contested.²⁴⁰ Imagine the furor that would greet as thorough a break with tradition as that implied by Patriot and the secret donation booth. The second reason for my skepticism is my sense that even if Congress were receptive to a proposal as original as that in *Voting with Dollars*, there are some complex aspects of the proposal that will excite consternation—not just among the enacting politicians but among the electorate. As an example, recall the sophisticated breakdown of how the fifty Patriot dollars may be allocated among House, Senate, and presidential races and between primary and general elections.²⁴¹ I fully understand the reasons for those restraints on the allocation of the Patriot dollars. But I wonder if these complexities may so distract from the basic simplicity of the proposal as to threaten its enactability. The third reason for my skepticism is that I do not recognize a clear constituency for this reform. Indeed, I think that there are many interests who will be, at best, worried about its possible outcome and, therefore, mildly opposed or will be, more likely, clear that the reform will threaten their interests in a dire fashion and, therefore, strongly opposed. For example, donors, consultants, lobbyists, political parties, and individual politicians all understand how the current system works, and they have all accommodated themselves to its constraints and even to reforms like those of McCain-Feingold. The new system that would follow from the passage of Ackerman-Ayres would not be as congenial to those who are prospering under the current system. Indeed, it would probably be a sterile environment for them, which is, no doubt, exactly as Ackerman and Ayres intend it to be. Nonetheless, these are bright people and they will discern that Ackerman-Ayres means an end to their livelihood and way of life, and they will oppose it with every device at their disposal.

Third, and finally, it is possible that as a result of Patriot and the secret donation booth, the electorate will confuse the act of donation with the act of voting and that, as a result, there may be unintended adverse consequences on the political life of the Republic. Suppose that the FEC publishes periodic reports on how much each candidate has received in Patriot dollars and through the secret donation booth. People may take these reports as indications of who is winning or likely to win the actual vote come election day. They may reason that the candidate who is re-

240. *Id.* at 177.

241. *See supra* notes 63–77 and accompanying text.

ceiving the most Patriot and private dollars is “winning” the hearts and minds of the electorate. And if so, it is possible that people will either stop paying attention to the election rhetoric and only pay attention to the FEC donation reports (in the belief that those reports are better than opinion polls) or will forgo actually voting on the theory that the donations constitute the real balloting.

Ackerman and Ayres envision a different process. Their hope is that the FEC’s periodic reports of Patriot and private donations will spur countervailing responses by the supporters of the candidate who appears to be falling behind.²⁴² If so, the result of the periodic reports may be more hotly contested elections than is currently the case (without, of course, the quid pro quo fears arising from nonsecret private donations).

I am not sure which of these consequences will ensue from the enactment of Ackerman-Ayres. I fear that the first consequence I described—Patriot and secret private donations substituting for voting—is *not* unlikely. If that were to happen, I would count the reform as a failure and would search elsewhere for improvements in our system of campaign finance.

IV. CONCLUSION

Ackerman and Ayres have, in their customary fashions, written an original, insightful, and provocative work of scholarship. They have taken on a very large problem—the relationship among income and wealth, the costs of getting elected to federal office, and our governmental policies—and shown us an alternative to the somewhat tired, frustrating, and relatively ineffectual campaign finance reform schemes that we have tried or that have been proposed.

They see two overarching problems in our current system of campaign finance: that there is a maldistribution of income and wealth so that the wealthy have a disproportionate influence on elections and governance, and that campaign donors are probably contributing in exchange for governmental favors, thereby inappropriately and unfairly influencing governmental policies. They direct the two central components of their proposal—Patriot dollars and the secret donation booth—at correcting those problems.²⁴³ Patriot involves giving every registered voter in the United States an annual allocation of fifty Patriot dollars, which he or she can donate to virtually any candidate for federal office in the country.²⁴⁴ Candidates can convert the Patriot dollars they have been given by individuals into dollars through the FEC and then spend them on any legitimate campaign expense.²⁴⁵ On the basis of the number of

242. See ACKERMAN & AYRES, *supra* note 12, at 74–75.

243. See *id.* at 25–44.

244. *Id.* at 14.

245. See *id.* at 95–100.

voters who participated in the 2000 presidential election (100 million), Ackerman and Ayres expect Patriot to generate \$5 billion in campaign funds for all federal candidates in each election cycle.²⁴⁶ That would be a significant increase over the amounts spent in elections heretofore.²⁴⁷

The second component of their reform is the institution of the secret donation booth.²⁴⁸ Patriot is not meant to replace private money in campaign finance but to supplement it.²⁴⁹ However, although private donations are still allowed, they must be made anonymously so that candidates cannot tell who has given private money to their campaigns and cannot, therefore, tailor their actions as public officials as “payments” for those contributions.²⁵⁰ Ackerman and Ayres propose some sophisticated methods of preserving anonymity in the face of a strong desire for donors to make themselves known.²⁵¹

A third element of their reform, one that is so compelling as to be beyond criticism, is to reform the FEC.²⁵² They would require that there be five members, all of whom are retired federal judges and who would serve for a single, nonrenewable term of ten years.²⁵³

While I have been critical of some aspects of the Ackerman-Ayres proposal, I have little doubt that it is an important contribution to the vexing and vexed issues of the appropriate relationship between private money and politics. And, moreover, I have little doubt that they have mapped out the general direction in which sensible reform lies.

246. *Id.* at 83.

247. *Id.* at 83–84.

248. *See id.* at 25–44.

249. *See id.* at 6–7.

250. *See id.* at 26–30.

251. *See id.* at 100–09.

252. *See id.* at 128–33.

253. *Id.* at 129–30.